

C. the first public distribution of the original and each copy of the sound recording by sale, rental or otherwise; and

D. the rental, lease or lending of the original or a copy of the sound recording for the purposes of direct or indirect commercial advantage.

Each Party shall provide that putting the original or a copy of a sound recording on the market with the right holder's consent shall not exhaust the rental right.

9. Each Party shall, through operation of this Agreement, apply the provisions of Article 18 of the Berne Convention for the Protection of Literary and Artistic Works to rights in existing sound recordings.

ARTICLE XIV

PROTECTION OF ENCRYPTED SATELLITE SIGNALS

1. Each Party shall make it:

A. a criminal offense to manufacture, assemble, modify, import, export, sell, lease or otherwise distribute a tangible or intangible device or system, knowing or having reason to know that the device or system is primarily of assistance in decoding an encrypted program-carrying satellite signal, without the authorization of the lawful distributor of such signal; and

B. a criminal offense willfully to receive or further distribute an encrypted program-carrying satellite signal that has been decoded without the authorization of the lawful distributor of the signal; and

C. a civil offense to engage in any activity prohibited under paragraph A or B.

Each Party shall provide that any civil offense established under paragraph C shall be actionable by any person that holds an interest in the encrypted programming signal or the content thereof.

ARTICLE XV

LAYOUT DESIGNS OF SEMICONDUCTOR INTEGRATED CIRCUITS

1. Each Party shall protect layout designs (topographies) of integrated circuits ("layout designs") in accordance with Articles 2 through 7, 12 and 16(3), other than Article 6(3), of the *Treaty on Intellectual Property in Respect of Integrated Circuits* as opened for signature on May 26, 1989 and, in addition, shall comply with the following provisions.

2. Subject to section 3, each Party shall make it unlawful for any person without the right holder's authorization to reproduce, import or distribute a protected layout design, an integrated circuit in which a protected layout design is incorporated, or an article incorporating such an integrated circuit only insofar as it continues to contain an unlawfully reproduced layout design.

3. Neither Party may make unlawful any of the acts referred to in section 2 performed in respect of an integrated circuit that incorporates an unlawfully reproduced layout design, or any article that incorporates such an integrated circuit, where the person performing those acts or ordering those acts to be done did not know and had no reasonable ground to know, when it acquired the integrated circuit or article incorporating such an integrated circuit, that it incorporated an unlawfully reproduced layout design.

4. Each Party shall provide that, after the person referred to in section 3 has received sufficient notice that the layout design was unlawfully reproduced, such person may perform any of the acts with respect to the stock on hand or ordered before such notice, but shall be liable to pay the right holder for doing so an amount equivalent to a reasonable royalty such as would be payable under a freely negotiated license in respect of such a layout design.

5. Neither Party may permit the compulsory licensing of layout designs of integrated circuits.

6. The term of protection for the layout design shall extend for at least ten years from the date of first commercial exploitation or the date of registration of the design, if required, whichever is earlier.

ARTICLE XVI

TRADEMARKS

1. For purposes of this Agreement, a trademark consists of any sign, or any combination of signs, capable of distinguishing the goods or services of one person from those of another, including words, personal names, designs, letters, numerals, colors, figurative elements, or the shape of goods or of their packaging. Trademarks shall include service marks, collective marks, and certification marks.

2. Each Party shall provide to the owner of a registered trademark the right to prevent all persons not having the owner's consent from using in commerce identical or similar signs for goods or services that are identical or similar to those goods or services in respect of which the owner's trademark is registered, where such use would result in a likelihood of confusion. In the case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any prior rights, nor shall they affect the possibility of a Party making rights available on the basis of use.

3. Acquisition of Rights

A. A Party may make registrability depend on use. However, actual use of a trademark shall not be a condition for filing an application for registration. Neither Party may refuse an application solely on the ground that intended use has not taken place before the expiry of a period of three years from the date of application for registration.

B. Each Party shall provide a system for registering trademarks, which shall include examination of applications, notification to an applicant of reasons for refusing registration, and an opportunity to respond to such notice. Each Party shall publish each trademark before registration or promptly thereafter. Each Party shall afford a reasonable opportunity for interested parties to petition to cancel registrations and to oppose registrations.

C. The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark.

D. Each Party shall refuse to register or shall cancel the registration and prohibit use of a trademark likely to cause confusion with a trademark of another which is considered to be well-known. Article 6bis of the Paris Convention shall apply, with such

modifications as are necessary, to services. In determining whether a trademark is well-known, account shall be taken of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Party's territory obtained as a result of the promotion of the trademark. Neither Party may require that the reputation of the trademark extend beyond the sector of the public that normally deals with the relevant goods or services or that the trademark be registered.

E. Each Party shall use the International Classification of Goods and Services for registration. Neither Party shall use such classification as the basis for determining the likelihood of confusion.

F. Each Party shall prohibit the registration as a trademark of words that generically designate goods or services or types of goods or services to which the trademark applies.

G. Each Party shall refuse to register trademarks that consist of or comprise immoral, deceptive or scandalous matter, or matter that may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs or a Party's national symbols, or bring them into contempt or dispute.

4. Initial registration of a trademark shall be for a term of at least 10 years. The registration of a trademark shall be indefinitely renewable for terms of no less than 10 years when conditions for renewal have been met.

5. Requirement of Use

A. Each Party shall require the use of a trademark to maintain a registration. The registration may be canceled only after an uninterrupted period of at least two years of non-use, unless legitimate reasons for non-use exist. Use of the trademark, where such use is subject to the owner's control, shall be recognized as use of the trademark for the purpose of maintaining the registration.

B. Legitimate reasons for non-use shall include non-use due to circumstances arising independently of the will of the trademark holder such as import restrictions on or other government requirements for products protected by the trademark which constitute an obstacle to the use of the mark.

C. Neither Party may encumber the use of a trademark in commerce by special requirements, such as a use that reduces the trademark's function as an indication of source or a use with another trademark.

6. A Party may provide limited exceptions to the rights conferred by a trademark, such as a fair use of descriptive terms, provided that such exceptions take into account the legitimate interests of the trademark owner and of other persons.

7. Compulsory licensing of trademarks shall not be permitted. The owner of a registered trademark shall have the right to assign its trademark with or without the transfer of the business to which the trademark belongs. However, a Party may require transfer of goodwill in a mark as part of the valid transfer of the mark.

ARTICLE XVII

INDUSTRIAL DESIGNS

1. Requirements for Protection

A. Parties shall provide for the protection of independently created industrial designs that are new or original. Parties may provide that designs are not new or original if they do not significantly differ from known designs or combinations of known design features. Parties may provide that such protection shall not extend to designs dictated essentially by technical or functional considerations.

B. Each Party shall ensure that requirements for securing protection for textile designs, in particular in regard to any cost, examination or publication, do not unreasonably impair the opportunity to seek and obtain such protection. Parties shall be free to meet this obligation through industrial design law or through copyright law.

2. Protection

A. The owner of a protected industrial design shall have the right to prevent third parties not having his consent from making, selling or importing articles bearing or embodying a design which is a copy, or

substantially a copy, of the protected design, when such acts are undertaken for commercial purposes.

B. Parties may provide limited exceptions to the protection of industrial designs, provided that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design.

C. The duration of protection available shall amount to at least ten years.

ARTICLE XVIII

PATENTS

1. Patentable Subject Matter

A. Each Party shall make patents available for any inventions, whether products or processes, in all fields of technology, provided that such inventions are new, result from an inventive step and are capable of industrial application. For the purposes of this Article, a Party may deem the terms "inventive step" and "capable of industrial applications" to be synonymous with the terms "non-obvious" and "useful," respectively.

B. Patents shall be available and patent rights enjoyable without discrimination as to the field of technology or whether products are imported or locally produced.

2. Rights Conferred

A. A patent shall confer on the patent owner the right to prevent others from making, using, or selling the subject matter of the patent without his consent. In the case of a patented process, the patent confers on the patent owner the right to prevent others from using that process and from using, selling, or importing the product obtained directly by that process without his consent.

B. Where the subject matter of a patent is a process for obtaining a product, each Party shall provide that the burden of establishing that an alleged infringing product was not made by the process shall be on the alleged infringer in one or both of the following situations:

- (1) the product is new, or
- (2) a substantial likelihood exists that the product was made by the process and the patent owner has been unable through reasonable efforts to determine the process actually used.

In the gathering and evaluation of evidence to the contrary, the legitimate interests of the defendant in protecting his confidential information shall be taken into account.

C. A patent may be revoked only on grounds that would have justified a refusal to grant the patent.

D. Patent owners may assign and transfer by succession their patents and conclude licensing contracts.

E. Each Party may allow for the lapse of a patent where the fees required to maintain the patent in force are not paid within prescribed time periods.

3. Each Party may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not conflict with the normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the right holder.

4. Each Party shall provide a term of protection of at least 20 years from the date of filing of the patent application or 17 years from the date of grant of the patent. Parties may extend the terms of patents, in appropriate cases, to compensate for delays caused by regulatory approval processes.

5. If a Party has not made available patent protection for products subject to a regulatory review period prior to its commercial marketing or use commensurate with section 1 as of seventeen years prior to the date of this Agreement, that Party shall provide to the inventor of any such product or its assignee the means to obtain product patent protection or equivalent protection for such product for the unexpired

term of the patent for such product granted in the other Party, as long as the product has not been marketed at the time of this Agreement in the Party providing protection under this section and the person seeking such protection makes a timely request. The transitional protection must, at least, give the patent owner or his assignee the right to exclude others from making, using and selling the invention during the remaining term of the patent granted by the other Party.

6. Where the law of a Party allows for use of the subject matter of a patent without the authorization of the right holder, other than that allowed under section 3, including use by the government or third parties authorized by the government, the following provisions shall be respected:

A. authorization of such use shall be considered on its individual merits;

B. such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and such efforts have not been successful within a reasonable period of time. The requirement to make such efforts may be waived by a Party in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly;

C. the scope and duration of such use shall be limited to the purpose for which it was authorized, and in the case of semi-conductor technology shall only be for public non-commercial use or to remedy a practice determined after judicial or administrative process to be detrimental;

D. such use shall be non-exclusive;

E. such use shall be non-assignable, except with that part of the enterprise or goodwill which enjoys such use;

F. any such use shall be authorized predominantly for the supply of the domestic market of the Party authorizing such use;

G. authorization for such use shall be liable, subject to adequate protection of the legitimate interests of the persons so authorized, to be terminated if and when the circumstances which led to it cease to exist and are unlikely to recur. The competent authority shall have the authority to review, upon motivated request, the continued existence of these circumstances;

H. the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization;

I. the legal validity of any decision relating to the remuneration provided in respect of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Party;

K. Parties are not obliged to apply the conditions set forth in paragraphs B and F above where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur;

L. Neither Party may authorize the use of the subject matter of a patent to permit the exploitation of another patent except as a remedy for an adjudicated violation of domestic laws regarding anticompetitive practices.

ARTICLE XIX

ACTS CONTRARY TO HONEST COMMERCIAL PRACTICE AND THE PROTECTION OF TRADE SECRETS

1. In the course of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention (1967), each Party shall protect undisclosed information in accordance with section 2 below and data

submitted to government or governmental agencies in accordance with sections 5 and 6 below.

2. Each Party shall provide the legal means for any person to prevent confidential information from being disclosed to, acquired by, or used by others, without the consent of the person lawfully in control of the information in a manner contrary to honest commercial practices, in so far as, and for so long as:

A. the information is not generally known among or readily accessible to persons that normally deal with the kind of information in question;

B. the information has actual or potential commercial value because it is secret; and

C. the person lawfully in control of the information has taken reasonable steps under the circumstances to keep it secret.

3. Neither Party shall limit the duration of protection for confidential information so long as the conditions in section 2 of this Article exist.

4. Neither Party shall discourage or impede voluntary licensing of confidential information by imposing excessive or discriminatory conditions on such licenses or conditions which dilute the value of confidential information.

5. Government Use

A. If a Party requires, as a condition of approving the marketing of pharmaceutical or agricultural chemical products which utilize new chemical entities, the submission of confidential test or other data necessary to determine whether the use of such products is safe and effective the Party shall protect against disclosure of the data of persons making such submissions where the origination of such data involves considerable effort, except where necessary to protect the public or unless steps are taken to ensure that the data is protected against unfair commercial use.

B. Unless the person submitting the information agrees, the data submitted pursuant to paragraph A may not be relied upon for the approval of competing products for a reasonable period of time, taking

into account the efforts involved in the origination of the data, their nature, and the expenditure involved in their preparation, and such period of time shall generally be not less than five years from the date of marketing approval.

C. Where a Party relies upon a marketing approval granted by another Party, the reasonable period of exclusive use of the data submitted in connection with obtaining the approval relied upon shall commence with the date of the first marketing approval relied upon.

ARTICLE XX

ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

For the purposes of Chapter II of this Agreement:

1. General Provisions

- A. Each Party shall ensure that enforcement procedures as specified in this Article are available under national laws so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement including expeditious remedies to prevent or stop infringement and remedies which constitute a deterrent to further infringements. In applying these procedures and remedies, parties shall provide safeguards against abuse and shall avoid creating obstacles to legitimate trade.
- B. Procedures for enforcing intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time limits or unwarranted delays.
- C. Each Party shall ensure that decisions on the merits of a case in judicial and administrative enforcement proceedings are, as a general rule, in writing and state the reasons on which the decisions are based; made available without undue delay at least to the parties in a proceeding; and based only on evidence in respect of which such parties were offered the opportunity to be heard.
- D. Each Party shall provide an opportunity for judicial review of

final administrative decisions on the merits of an action concerning the protection of an intellectual property right. Subject to jurisdictional provisions in each Party's laws concerning the importance of a case, an opportunity for judicial review of the legal aspects of initial judicial decisions on the merits of a case concerning the protection of an intellectual property right shall also be provided. Notwithstanding the above, neither Party shall be required to provide for judicial review of acquittals in criminal cases.

2. Specific Procedural and Remedial Aspects Of Civil Actions

A. Each Party shall make available to right-holders civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement. Defendants in such procedures shall have the right to written notice which is timely and contains sufficient detail, including the basis of the claims. Parties to such procedures shall be allowed to be represented by independent legal counsel, and procedures shall not impose burdensome requirements concerning mandatory personal appearances. Parties to such procedures shall be duly entitled to substantiate their claims and to present all relevant evidence. The procedure shall provide a means to identify and protect confidential information.

B. Each Party shall provide its judicial authorities the authority to order a party to a proceeding to desist from an infringement, including to prevent the entry into the channels of commerce in their jurisdiction of imported goods that involve the infringement of an intellectual property right. Neither Party is required to accord such authority in respect of protected subject matter acquired or ordered by a person or entity prior to knowing or having reasonable grounds to know that dealing in such subject matter would entail the infringement of an intellectual property right.

C. Each Party shall provide its judicial authorities the authority, where a party has presented reasonably available evidence sufficient to support its claims and has specified evidence relevant to substantiation of its claims which lies in the control of the opposing party, to order that this evidence be produced by the opposing party, subject in appropriate cases to conditions which ensure the protection of confidential information.

D. In cases in which a party to a proceeding voluntarily and without good reason refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedes a procedure relating to an enforcement action, a Party shall accord judicial authorities the authority to make preliminary and final determinations, affirmative or negative, on the basis of the information presented to them, including the complaint or the allegation presented by the party adversely affected by the denial of access to information, subject to providing the parties an opportunity to be heard on the allegations or evidence.

E. Each Party shall provide its judicial authorities the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of his intellectual property right by an infringer who knew or had reasonable grounds to know that he was engaged in infringing activity. Judicial authorities shall also have the power, at least with respect to works protected under copyright and neighboring rights, to order pre-established damages.

F. In order to create an effective deterrent to infringement, each Party shall provide its judicial authorities the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed outside the channels of commerce in such a manner as to avoid causing any harm to the right-holder, or, unless this would be contrary to existing constitutional requirements, destroyed. The judicial authorities shall also have the authority to order that materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements. In considering such requests, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interest of third parties shall be taken into account. In regard to counterfeit goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into channels of commerce.

G. Notwithstanding the other provisions of this Article XX, when